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Expectations in Tort

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Rights and responsibilities, inextricably bound together, ground human dignity. In an important article exploring wide aspects of law and morals, *Dignity, Rights, and Responsibilities*,[1] Jeremy Waldron reminds us that John Locke, Immanuel Kant, and other great thinkers explained that human dignity springs from free will—the ability of humans, in pursuing our various objectives, to choose one goal or action over another, together with our capacity to distinguish good actions (respectful of others' rights) from bad (disrespectful of others' rights). While free will in this way endows people with great power, it also encumbers us with heavy responsibility for making proper choices as we act to achieve our goals.[2]

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*. Carolina Distinguished Professor of Law, University of South Carolina. Thanks to Karen Miller, Brooks Miller, Christopher Jones, and Olesya Vaskevich for research and editorial assistance. This Essay is for Ethan Owen, an ASU alumnus.

1. Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 44 ARIZ. ST. L.J. 1107 (2012). Professor Waldron presented his essay as the Shoen Lecture at Arizona State University on October 1, 2010. That essay, together with much of Professor Waldron's other insightful commentary on law and philosophy, provided inspiration for this Essay on expectations in tort.

2. The very notion of free will, of course, on which human dignity rests, is fraught with difficulty. *See, e.g.*, Saul Smilansky, *Free Will and Respect for Persons*, 29 MIDWEST STUD. IN

Citizens of this nation are privileged beneficiaries of a political system of ordered liberty that provides a robust system of property rights with minimal state interference into the affairs of individuals who are largely free to pursue their separate interests as they choose. The principal restraint on each person's right to freely pursue one's goals is a commensurate responsibility not to trample on the similar rights of other persons—a duty of respect for the equal rights of others. Freedoms invariably clash, in a hectic world of billions of active inhabitants, when one person's exercise of freedom infringes on the equal freedom rights of another person—most plainly when one person's actions cause harm to another person's bodily, personality, or property security.

Society orders liberty through principles and rules that declare and enforce the limits of personal freedom to harm others. Thus, formal mandates of individual responsibility—laws—prescribe that one person may not strike another person or take the other's goods without good reason (as for self-protection or when the other consents). On behalf of society, the law of crimes enforces the most serious breaches of responsibility that infringe the rights of others by publicly denouncing such wrongdoing and fashioning appropriate punishment therefor. Private law—property, contract, and particularly the law of tort—provides guidance on the bounds of human freedom and a mechanism by which victims of harmful rights invasions may obtain redress from actors responsible for such harm because they have acted outside the equal-freedom bounds of acceptable behavior.

Explorations of rights and responsibilities in tort usually head in one of two directions: toward framing rights (often based in moral theory, and frequently dubbed "corrective justice") or toward maximizing social welfare (often based in social utility, and frequently conceived as economic efficiency). The inquiry here—how human expectations figure in tort law—draws essentially from principles of rights, yet its implications suggest that the protection of expectations tends generally to maximize social utility. This Essay explores why human expectations are important and how they fit within the law of tort.

I. EXPECTATIONS AS TWIN PILLARS OF TORT

For a couple of millennia, the two great heads of the law of obligations—rules governing the compensatory responsibilities of people in harmful

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PHIL. 248, 261 (2005) (exploring how respect for persons is grounded in a notion of responsibility for the choices we freely make, even if that predicate is illusory, and concluding that, "[a]t the depths, the libertarian illusion is constitutive of our very humanity; it is a condition for deep self-respect and for respect for persons").

interactions—have been framed as the law of tort and the law of contract.[3] Theorists long have argued that contract law is properly viewed as a mechanism for enforcing the reasonable expectations of contracting parties. Arthur Corbin, for example, begins his great treatise on the law of contracts with an assertion that "the main underlying purpose" of contract law is "the realization of reasonable expectations that have been induced by the making of a promise."[4] While this foundational assertion is framed in terms of the expectations of the party potentially harmed by the actor, promises are made and expectations arise on both sides of a contract—both parties typically making assertions and otherwise acting in various ways that shape the nature of an agreement that binds them both.

The thesis of this Essay is that tort law similarly shapes its principles around the expectations of the parties. As in contract law, one naturally focuses initially on the expectations of victims in security from harm. Yet, the twin nature of expectation protection is strong in tort as well as in contract, as throughout the law,[5] such that the expectations of actors in freedom to pursue their goals also count in assessing responsibility for harm, as we shall see. Expectations might preliminarily be viewed as twin

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3. This was a fundamental division in early Roman law. *See, e.g.*, H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW ch. 17, at 271–304 (3d ed. 1972) (examining the two large heads of the Roman law of obligations, tort (*delict*) and contract).

4. 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 1.1, at 2 (Joseph M. Perillo rev. ed. 1993). *See generally* Catherine Mitchell, *Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law*, 23 OXFORD J. LEG. STUD. 639 (2003) (exploring the nature and limitations of reasonable expectations in contract law).

5. Expectations also animate the law of property: "[A]ny right in property must be grounded in the property owners' legitimate expectations . . . ." Jerry L. Anderson, *Takings and Expectations: Toward A "Broader Vision" of Property Rights*, 37 U. KAN. L. REV. 529, 529 (1989). Enhancing both freedom and utility, property rights serve to protect the expectations of property holders that society will protect the interests that customarily attach to such holdings.

More generally, expectation protection is a value that spans across the law. "Contract, property and tort claims are often justified on the grounds that they protect reasonable expectations. Indeed, . . . perhaps the norm of protecting reasonable expectations generates all legal rules . . . ." Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 19–20 (1997) (noting Patrick Atiyah's claim that Hume viewed property as resting on expectations, and that this ethic "spilled over to contract and tort," *id.* at 19 n.1). More broadly, Roscoe Pound observed: "Looking back over the whole subject, shall we not explain more phenomena and explain them better by saying that the law enforces the reasonable expectations arising out of conduct, relations and situations . . . ?" ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 189 (1922). This does not mean, of course, that expectation protection explains all law, an institution with "too many rooms to unlock with one key." Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984).

pillars of tort, then, because we robustly count the expectations of both actors and victims alike.[6]

Another kind of "twinness" that animates expectations derives from the causal fact that all people are at once actors and potential victims. People are simultaneously actors and potential victims when they walk down a roadway—as actors, they can stumble over a child; as potential victims, they can be struck by a car. When people sit in a chair, they are, of course, potential victims. Yet, even when people merely sit in a chair, they are also actors causing harm: by choosing to move into and thence occupy limited space, the chair sitter harms other persons who may need or desire to occupy that space as well.

We normally view a chair sitter, of course, as principally a potential victim, since property notions of first-in-time often appear to grant the first sitter a right to occupy the space.[7] So, if another person sits down in an occupied chair, on top of the occupant, or, if a car or airplane crashes through a roof and into the chair and its occupant, we often ignore the first chair occupant's prior conduct in frustrating the interests of others to occupy that space and focus instead on the conduct of the later actor in sitting on or crashing into the occupant of the chair.

While we ordinarily view chair sitting as a passive form of behavior, it is behavior nonetheless—comprised of numerous, deliberative choices to take and thereafter keep a limited good, the space, thereby depriving others of the opportunity to have the good until the chair sitter chooses to relinquish it. Another person may want to sit in the now-occupied chair for a better view of a television screen, or possibly may need to occupy the chair to avoid bright sunlight shining with merciless intensity throughout the rest of the room on a hot summer day (say, in Phoenix), in which case the chair occupant's continuing choice to remain in the chair may be viewed as a series of "actions" that harm the other person. In myriad ways, therefore, all persons always are actors harming others, as they themselves are always harmed, potentially at least, by everyone else. We all are at once (potential) injurers and (potential) victims, that is to say, all of the time.

The salience here of this two-headed feature of human choice is that each head possesses separate expectations of an actor, or potential injurer, and those of a potential victim. Whatever we may be doing, that is, we all know that our actions at any time (theoretically at least) may harm another, ourselves, or both. That the expectations of one side of this twin (injurer or

6. In addition to the expectations of parties to individual transactions, the expectations of others count as well since rules of law variously affect all members of a community.

7. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 59–63 (1995) (explaining the benefits of the "first possession" rule).

victim) often predominate is not of special interest here. What *is* significant is that all persons must all the time consider the expectational interests of themselves and others in both action and security. Viewed in this light, each of us is a kind of two-headed schizophrenic who has much to contemplate in making choices on how to act to achieve our various goals while seeking also to preserve the security and other interests of ourselves and others.

II. WHY EXPECTATIONS ARE IMPORTANT

Expectations are fundamentally important to all sentient beings, including humans. Life forms must adapt their conduct to obtain whatever in the environment fosters life—a frog must find flies and catch them with its tongue, or it will die; a flower must find sunshine and water, or it will die; humans, too, must find food and shelter, or we will die. So, in order to exist, we must learn how the world operates and then apply that knowledge to mold our actions and bend our environment in ways that predictably facilitate existence. Stephen Perry aptly refers to predictions of this type—of how the laws of nature (including the behavior of other humans) predictably will operate in the future—as "causal regularities."[8] More commonly, we refer to such predictions of cause and effect as "expectations." Viewed in this elemental way, expectation fulfillment is fundamental to life, not only to existence, but broadly to the fulfillment of all human goals.

Various factors, of course, often frustrate goal fulfillment. Our plans to achieve certain objectives frequently clash with new goals that then seem more important, thus frustrating our prior objectives: our desire to finish a project or lose weight may be frustrated by a friend's entreaty to go to lunch. Sometimes, our goals are unexpectedly frustrated by external factors, as by a traffic jam or thunderstorm that interferes with a tennis game or a round of golf. There is nothing much we can do about such environmental frustrations to our expectations but to accept them as a natural part of life in a world over which we have but limited control. Yet sometimes our most important and reasonable expectations in maintaining our physical and economic security are frustrated in a major way. And when such expectation frustrations are at once substantial and inflicted upon us unfairly by another person, moral theory and tort law both suggest that the other person should give us restitution for our resulting harm.

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8. *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 505 (1992); *infra* note 59.

III. FREEDOM, TRUTH, AND EXPECTATIONS

Expectations often are bound up with freedom and truth. Within a broad philosophy of government and justice, freedom may be viewed as the first and most essential moral and political ideal,[9] "the one sole and original right that belongs to every human being by virtue of his humanity."[10] The freedom concept rests on the concept of free will[11]—the notion that humans are capable of rationally selecting personal goals, and on the premise that humans possess the means to achieve those ends. This idea, which contrasts with determinism and is often called autonomy,[12] implies a range of options and opportunities—alternatives from which to choose. As a person's choices are enhanced, so too is the person's freedom. Freedom accords humans dignity, as previously mentioned, in allowing every person to design and follow his or her own life plan, distinct from any other, while also placing responsibility on people to make choices respectful of the competing interests of other persons.

Within freedom lies the ideal of truth, a concept closely related to knowledge. From the time of Plato, knowledge classically has been defined as "justified true belief."[13] While knowledge, justification, truth, and belief are all functionally related, truth is the only one that is absolute, the only true ideal.[14] For help in resolving moral questions arising out of harmful

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9. *See, e.g.*, Robert B. Thigpen & Lyle A. Downing, *Liberalism and the Communatarian Critique*, 31 AM. J. POL. SCI. 637 (1987). Equality and community ideals presuppose the lexical priority of freedom. "Liberty is crucial to political justice because a community that does not protect the liberty of its members does not—cannot—treat them with equal concern . . . ." Ronald W. Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 53 (1987) [hereinafter Dworkin, *What is Equality?*] (explaining "[t]he priority of liberty, under equality of resources"). Much of this section draws from David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 201, 202–06 (David G. Owen ed., 1995).

10. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (*Rechtslehre*) *237 (John Ladd trans., 1965) (1797) [hereinafter KANT, ELEMENTS OF JUSTICE]. Freedom, autonomy, and morality in Kant's view are all inseparably bound together. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *452–53 (L. Beck trans., 1959) (1785) [hereinafter KANT, METAPHYSICS OF MORALS]. "Autonomy is thus the basis of the dignity of both human nature and every rational nature." *Id.* at *436. Kant viewed autonomy, freedom of the will, as "the supreme principle of morality." *Id.* at *440.

11. "The will is free, so that freedom is both the substance of right and its goal . . . ." GEORG W.F. HEGEL, PHILOSOPHY OF RIGHT 20, para. 4 (T.M. Knox trans., 1965) (1821). Recall, however, the challenge to this proposition. *See supra* note 2.

12. I use the two terms interchangeably, although for some purposes there may be value in distinguishing between them. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM ch. 15 (1986).

13. PAUL K. MOSER & ARNOLD VANDER NAT, HUMAN KNOWLEDGE: CLASSICAL AND CONTEMPORARY APPROACHES 305 (1987).

14. Aristotle viewed truth as "*more* self-evidently and fundamentally good than life." J.M. Finnis, *Scepticism, Self-Refutation, and the Good of Truth*, *in* LAW, MORALITY, AND SOCIETY—

human interactions, truth may be viewed as the correspondence of a person's beliefs to reality,[15] which includes the correspondence of one's expectations to how the future in fact unfolds.

The intelligent and effective selection and pursuit of goals implies an ability to perceive and comprehend objects and beings in the world and how those things interrelate according to principles of cause and effect, as previously discussed. No person, of course, can completely know the truth, which is one important reason why no one can ever be completely free. Humans, hampered by both physical and cerebral imperfection, see the real world but dimly, and so their choices of both ends and means to acquire goods (including security), are always frustrated by their lack of knowledge. Conversely, truth promotes autonomy—by improving the correspondence between people's beliefs and expectations, on the one hand, and the world as it exists and evolves, on the other. Truth is therefore a good that helps humans achieve their goals. In both moral and legal terms, responsibility for harmful consequences of actions often hinges on how, why, and the extent to which an actor interfered with a victim's possession of truth.

If a correspondence between belief and fact always existed, if a person's expectations always matched reality, torts would be few and far between. Yet such is not the world in which we live, alas, where we often mistake shadows for reality,[16] and where unexpected harm, often caused improperly by other persons, is all too common.

Intentionally inflicted harm is generally based upon a subversion of truth. A person causing such harm is therefore at fault, as a preliminary

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ESSAYS IN HONOUR OF H.L.A. HART 247, 249 (P.M.S. Hacker & J. Raz eds., 1977). Knowledge, for example, only describes the state of possessing the ideal of truth. The notions of knowledge and truth are so closely related, however, that they may often be substituted for one another. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 59 (1980) (interchanging the terms "knowledge" and "truth," and referring to truth as "the basic good").

15. "Perhaps the most ancient and certainly in all eras the most widely accepted theory of truth is the *correspondence theory*, according to which truth is *correspondence to fact*." NICHOLAS RESCHER, THE COHERENCE THEORY OF TRUTH 5 (1973). *See also* D.M. ARMSTRONG, BELIEF, TRUTH AND KNOWLEDGE 113 (1973) ("The traditional correspondence theory [of truth] holds that p is true if, and only if, it corresponds to reality."). Because the correspondence theory of truth provides epistemologists with only partial help in resolving abstract questions of knowledge, particularly in respect to the truth of propositions, it holds little interest for many modern philosophers. *See generally* THOMAS MORAWETZ, WITTGENSTEIN & KNOWLEDGE ch. 3 (1978); RESCHER, *supra*, at ch. I. For help in analyzing problems of harmful conduct, however, which involve "truths of fact" rather than "truths of reason," a definition of truth in correspondence terms is most useful here.

16. "Beware lest you lose the substance by grasping at the shadow." AESOP, AESOP'S FABLES 55 (Jack Zipes ed., Signet Classics 2004) (*The Dog and the Shadow*, parable XXXI). *See also* PLATO, THE REPUBLIC bk. 7 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Texts in the History of Political Thought 2000) (the cave allegory).

matter, not because he has harmed the victim but because of the truth-falsification means by which the actor converted the victim from an autonomous person into an involuntary object of harm. Fraud and defamation both are widely understood to be grounded in an actor's deliberate falsification of the world to the detriment of the victim. Yet most other intentional harms are based on truth subversion, too. Whether the actor be a poisoner of candy, a burglar who cloaks himself in the mantle of the night, or an assailant who conceals a handgun in his pocket or himself behind a tree, the success of each such intentionally harmful venture—and its prima facie wrongfulness—rests substantially upon the actor's prior theft of truth from the victim.

Truth and expectations, or their infringement, also play a powerful role in causing accidents and determining blame therefor. Indeed, the very word "accident" is defined in terms of *unexpected* harm.[17] Accidental harm, then, is harm attributable to the failure of at least one person—the actor, the victim, or both—to expect the harm, to possess the truth concerning the bundle of things that combine to cause the harm.

For an everyday example of the role of expectations in accident causation, imagine a simple intersectional collision between two cars: *A*, driving toward an intersection, sees the traffic light change from green to yellow and mistakenly believes that he can enter and clear the intersection before the light turns red. *B*, waiting on the intersecting street, enters the intersection as soon as her light turns green, mistakenly believing that it will be clear of traffic. *A* and *B* enter the intersection simultaneously, at right angles, and their cars collide. Here, the collision is attributable to the failure of both *A* and *B* to expect the conduct of the other—to possess the truth about the status of the intersection at the time of the collision. By convention in this situation (as reflected in customary rules of the road), primary responsibility for determining the truth—and, accordingly, primary fault in failing to obtain it—is allocated to the driver who enters the intersection after seeing the light turn from green to yellow, and who passes through just as it turns red. Yet fault may also lie with the other driver who may have started up too quickly when the light turned green, and who failed perhaps to watch for crossing drivers who predictably might chance squeaking through the intersection at the moment their light turned red. Here, as in myriad other contexts involving accidental harm, both causation

17. *See, e.g.*, THE OXFORD MINIDICTIONARY 3 (1981) (an "unexpected event, esp. one causing damage"); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 9 (1964) ("a happening that is not expected"). *See generally* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 151 (2d ed. 1985).

and fault are rooted in the failure of one or both parties to expect the conduct of the other.

A person's ability to control his or her life, to live effectively within a dynamic world, thus depends upon the extent to which the person's vision of the world is true. When the world operates in a manner contrary to what people expect, they are vulnerable to both intentionally and accidentally inflicted harm. Truth—expectation fulfillment—is thus fundamentally important to the freedom that humans need to protect themselves from harm, and fault for harm is often rooted in how and why the expectations of an actor and a victim departed from the truth.

IV. EQUAL FREEDOM AND FAIR EXPECTATIONS

In a crowded world, each person's pursuit of goals often conflicts with other persons' pursuit of their own objectives. The law therefore must draw boundaries around individuals, defining where one person's freedoms end and another person's freedoms begin.[18] The most elementally powerful criterion for drawing such freedom boundaries in a just and enduring society is equality.[19]

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18. This concept is nicely captured in Nozick's "border crossing" metaphor. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ch. 4 (1974). This section draws substantially from David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 201, 206–11 (David G. Owen ed., 1995).

19. The equality ideal has been a profoundly important ethic in moral and political philosophy throughout the ages. It was a central ethic in Aristotle's theory of corrective justice. "[T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavour of the judge is to equalize it . . . ." ARISTOTLE, THE NICOMACHEAN ETHICS 146 (J.E.C. Welldon trans., 1987) (bk. 5, ch. 7). Equality was central to the philosophy of Kant, who considered it to be contained within the principle of freedom. KANT, ELEMENTS OF JUSTICE, *supra* note 10, at *237–38; *see infra* note 22. And its elemental power remains at the heart of much contemporary jurisprudence. *See generally* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988) ("Every moral theory has some conception of equality among moral agents . . . ."); RONALD M. DWORKIN, LAW'S EMPIRE 295–301 (1986); JOHN RAWLS, A THEORY OF JUSTICE §§ 11, 32–40, 77 (1971); PETER WESTEN, SPEAKING OF EQUALITY (1990) (examining the paradoxes, rhetorical force, and various conceptions of equality); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 577 (1989) [hereinafter Waldron, *Particular Values*] ("[O]ne cannot go anywhere in serious moral thought except on the basis of some assumption about the fundamental equality of human worth.").

The innate link between freedom and equality is captured succinctly by Hart: "[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free." H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955), *reprinted in* THEORIES OF RIGHTS 77, 77 (Jeremy Waldron ed., 1984). The constitutive link between equality of resources and freedom is explained in Dworkin, *What is Equality?*, *supra* note 9, at 54

An obligation to accord equal respect to the interests of others may be the most helpful form of equality for ascertaining moral responsibility and fault for harmful conduct in tort. Philosophers across the ages, from Plato[20] and Aristotle[21] to Kant,[22] Nozick,[23] Rawls and Dworkin,[24] and Waldron,[25] generally have accorded some such notion of equality a central position among moral values. A formulation of equality along these lines, which Ronald Dworkin dubbed an "equality of concern and respect," allows each person the maximum amount of freedom (for both action and security) consistent with an equal right of others.[26]

While equality may be criticized for being "empty,"[27] devoid of analytical content, and thus incapable of helping define freedom or any other ideal,[28] the charge of emptiness misses the fundamental point of equal freedom that proclaims the intrinsic worth of every human.[29] The value of this abstract notion of personhood and equality lies not in its substance, for it provides few insights into how particular conflicts should be resolved, but

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(arguing that "liberty and equality are not independent virtues but aspects of the same ideal of political association," which "strategy uses liberty to help define equality and, at a more abstract level, equality to help define liberty"). *See also infra* note 30.

20. *See* PLATO, LAWS VI. 757, at 143 (Taylor trans.), *quoted in* WESTEN, *supra* note 19, at 52–53.

21. *See* ARISTOTLE, *supra* note 19, at 150–60.

22. "Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law." KANT, ELEMENTS OF JUSTICE, *supra* note 10, at *231.

23. Nozick may find the least use for equality among major contemporary philosophers. *See* NOZICK, *supra* note 18, at 222–24. He is not alone, of course, in this position. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For a valuable critique of equality from a leading English legal philosopher, see RAZ, *supra* note 12, ch. 9.

24. Rawls and Dworkin both view equality as central to their systems. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 222–24, 453–504 (1971); Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL'Y 24 (1983).

25. *See* Waldron, *Particular Values*, *supra* note 19.

26. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 182 (1977) (noting that Rawls's concept of "justice as fairness rests on the assumption of a natural right of all men and women to [an] equality of concern and respect . . . [possessed] simply as human beings with the capacity to make plans and give justice"). *Cf.* RAWLS, *supra* note 24, at 60 ("[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.").

27. *See* Peter Weston, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (making this charge). It is at least ambiguous. WESTEN, *supra* note 19, at 73–74.

28. WESTEN, *supra* note 19. By "empty," Professor Westen meant that normative equality claims are "*derivative*," not "meaningless." *Id.* at xix–xx.

29. *See* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983). *See generally* RAZ, *supra* note 12, at 228.

in its structure, which affords a principled framework for making interpersonal comparisons when evaluating moral questions—such as responsibility for harmful interactions—when freedoms clash.[30]

Most elementally, each person possesses an equal abstract right to pursue and protect his or her own interests without undue interference from others. Bearing prominently on intentionally inflicted harms, this right suggests that an actor should not *deliberately* harm another to advance the actor's own interests without due consideration of the potential victim's fair expectations of freedom from harm. For example, one should not deliver an unprovoked punch in the nose merely to show off one's pugilistic skills, allay one's anger, or win a bet. Since one person's abstract autonomy rights are equal to every other person's similar rights, no person should infringe the autonomy of another without fair consideration of the expected harm to the other's interests. Simply put, one person may not fairly choose to harm the vested interests of another without consent or justification.[31] Harmful conduct thus may be viewed as unjust or wrongful, in equality terms, if the actor chose to cause the harm while knowing that it would violate the victim's equal right to freedom.[32]

When an actor *accidentally* rather than purposefully causes harm to another, very different choices are involved. As previously explored, it is inevitable in a busy world that there will be many collisions between persons with imperfect skills and expectations. Moral responsibility and blame for such accidents hinge on the nature of the expectations, choices,

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30. Consider the breadth and power of the Kantian ideal of equal freedom expressed by Roger Pilon:

> [W]e proceed from a [natural law] premise of moral equality—defined by rights, not values—which means that no one has rights superior to those of anyone else. So far-reaching is that premise as to enable us to derive from it the whole of the world of rights. Call it freedom, call it "live and let live," . . . the premise contains its own warrant and its own limitations. It implies the right to pursue whatever values we wish—provided only that in doing so we respect the same right of others. And it implies that we alone are responsible for ourselves, for making as much or as little of our lives as we wish and can. What else could it mean to be free?

Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 509–10 (1993) (footnotes omitted).

31. Vested interests raise higher expectations of protection than less-settled interests. *See* Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1380 (1993) ("[I]t is easy to disregard . . . expectations in cases where they are not, in some sense, settled or protected.").

32. "If a person hurts another from deliberate moral purpose, he acts unjustly." ARISTOTLE, *supra* note 19, at 172.

and actions of both parties to a collision. Framing the moral character of such choices, the abstract notion of equality helps reveal the fallacy of a common intuition that responsibility for accidents generally should fall upon an actor rather than on a "passive" victim.

The world in which we live is a dynamic one, where action is necessary to achieve one's goals, both to protect and to enhance one's property and satisfaction. Abstract equality suggests that action and security interests in such a world are of equal order, that the interests of an accident victim have no inherent priority over the interests of the actor. Despite an undeniable counter-intuition, an accident victim's passive security interest in maintaining his or her stock of goods logically should have no higher intrinsic value than an actor's affirmative action interest in protecting (and augmenting) the actor's own stock of goods.[33] Indeed, freedom of action is especially deserving of protection in a dynamic world because people must actively readjust to ever-changing conditions, even if their only goal is to protect their own security.[34]

Autonomy entails the notion that people may—indeed, must—make choices based upon expected outcomes, and then act upon those choices. It is a simple truism that each such action always restricts in some measure the choices available to other persons, as in the chair-sitter example previously discussed. It may be helpful at this point to restate the matter in the abstract: If *A* decides to move from point *x* to point *z*, and does so, he deprives *B*, standing at point *y*, of the opportunity to move to *z*. This also is true of decisions *not* to act, to remain passive: If *A*, standing at point *x*, decides not to move at all, he limits the opportunity of *B*, standing at point *y*, to move to *x*. Thus, whether of action or inaction, all choices of all persons diminish in some manner the available choices of other persons who are "harmed" to that extent. The choices and action inherent in the very notion of individual autonomy, therefore, imply harm to other persons. In an ever-shifting world committed to autonomy and equality, the inevitability of harm from action suggests that no initial preference should be given to security over action,

33. "[T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no [sound] policy in throwing the hazard of what is at once desirable and inevitable upon the actor." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 95 (1881); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 428 (1987) (asserting that a property holder may not insist that his security interests are more valuable than an actor's freedom).

34. *See* G. DWORKIN, *supra* note 19, at 112 ("In general, autonomy is linked to activity, to making rather than being, to those higher forms of consciousness that are distinctive of human potential.").

which undermines the strict-liability notion that merely *causing* harm is wrong.[35]

The fact that actor and victim interests count equally in the abstract does not mean that morals and the law have nothing useful to say about responsibility for resulting harm when actor and victim expectations collide. In fact, the equal freedom ideal informs accountability for such harm by providing a framework for evaluating the *fairness* of the parties' colliding expectations. The equal freedom ideal holds that the protection of one person's expectations and other freedoms is inherently constrained by equal protection of the same interests of other persons. In this way, the equality prong of equal freedom demands that one person's freedoms extend no further into the freedom realms of other persons than is "fair." This intrinsic fairness limitation on freedom thus leads to the conclusion (seemingly circular though it may be) that one person should not harm another by unfairly frustrating the other's fair expectations. Equal freedom thus suggests that the law should protect the realm of human expectations, as other freedoms, so far as such expectations may be considered respectful of the equal right of others, so far as they may be considered fair.

V. WHEN ARE EXPECTATIONS FAIR?

If equal freedom limits its protection of expectations to those deemed "fair," and no others, we shall need to know how to distinguish fair from unfair expectations. In searching for the kinds of expectations that most would agree are fair, we might first look to the laws of nature. Of necessity, humans make judgments according to commonly understood principles of physics and biology—of cause and effect, gravity, friction, momentum, and the instinct of living creatures for survival. It seems fair to suppose that persons who have survived for a number of years on a planet controlled by natural laws understand those laws, including the fundamentals of being and becoming. So, we may assume that an operator of a stationary automobile who contemplates traversing an intersection will understand that vehicles moving at high speed on the crossing highway will not be able to stop instantly if the stationary driver suddenly enters the intersection without warning, and that other drivers may thus expect drivers of crossing vehicles, before proceeding into intersections, to wait for cars with the right of way to pass to avoid injury to all. Similarly, we may well suppose that operators of

35. For the classic explanation of why strict liability fails in logic and morals, see Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147 (1988). For the classic exposition of the contrary view, see Honoré, *infra* note 56.

automotive vehicles know that driving on bald tires at high speed may lead to a blow out and accident at any time, thereby frustrating the expectations of others that operators will avoid driving on tires that plainly have worn out.[36] Basic principles of mechanics and other laws of nature thus form a backdrop of expectations that we fairly may assume all adult persons to possess.[37]

Secondly, people fairly expect that others usually will obey important statutory duties, such as rules of the road.[38] In addition, principles of proper interaction in recurring types of social relationships—often based on custom, statute, or common law (such as the exclusive nature of property rights and the truth of important promises)—commonly create fair expectations that others will conform to those principles. So, a person ordinarily may walk upon or otherwise use his or her own land with a fair expectation of security from injury by bullets from a hunter's gun.[39] And a landowner may expect an uninvited person to look out for natural dangers, like swamps and alligators, when trespassing on land that may well contain such hazards.[40] Similarly, when a seller claims that canned chicken is "boned" and has "no bones,"[41] or that a "Golfing Gizmo" is "safe" and that its "ball will not hit player,"[42] a consumer fairly may expect such statements to be true. Over time, rights to the exclusive use of property, and rights to rely on important assertions of safety, have acquired customary status in society.[43]

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36. *See* Delair v. McAdoo, 188 A. 181, 184 (Pa. 1936) ("Any ordinary individual, whether a car owner or not, knows that when a tire is worn through to the fabric, its further use is dangerous and it should be removed . . . . All drivers must be held to a knowledge of these facts.").

37. "[T]here are certain things which every adult with a minimum of intelligence must necessarily have learned: the law of gravity, the fact that fire burns and water will drown, that flammable objects will catch fire, that a loose board will tip when it is trod on, the ordinary features of the weather . . . , and similar phenomena of nature." W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, AND DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 183 (5th ed. 1984) (footnotes omitted).

38. *See* FINNIS, *supra* note 14, at 285.

39. *See, e.g.*, Delgado v. Lohmar, 289 N.W.2d 479, 481 (Minn. 1979) (allowing landowner injured by hunter's shotgun to recover in negligence).

40. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52(a) & cmt. d (2012) (stating that there is no duty of reasonable care to flagrant trespassers, especially with respect to natural conditions on unimproved and uninhabited land).

41. *See* Lane v. C.A. Swanson & Sons, 278 P.2d 723, 726 (Cal. Ct. App. 1955) (allowing recovery).

42. *See* Hauter v. Zogarts, 534 P.2d 377, 379 (Cal. 1975) (allowing recovery).

43. On the role of custom in tort law, see Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784 (2009); Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942).

Moreover, various special relationships fairly induce expectations that one party in the relationship will protect the interests of the other. Professional relationships often involve a substantial imbalance of power between a client and a professional person with special expertise, such as a doctor, banker, or lawyer. The nature of such professional relationships, with ancient roots in both tort and contract, is that a person who engages another to provide such specialized services necessarily must repose great trust in the specialist to diligently strive to protect the weaker party's interests. This is also true in various other, less formal relationships, where one type of person customarily takes responsibility for the safety and other well-being of another. So, we fairly expect teachers, babysitters, and other custodians of small children to take special care to protect them from cars and other dangers in the world;[44] and, while the expectation of protection may not be as strong, one of two companions who is badly injured on a social venture may well expect the other to find him medical assistance.[45]

In all such relational situations, promises, custom, and sometimes formal regulatory standards shape the protection expectations to which the vulnerable member of the relationship is entitled.[46] At bottom, many dependent relationships involve "causal regularities" of protection that the vulnerable party may expect the stronger party to provide. To the extent that such expectations are grounded in promises or are widely shared and clear, they generally may be considered fair. And fair expectations are the kind that shape the law of tort, and that tort law will protect.

VI. WHY NOT *ACTUAL* EXPECTATIONS?

Equal freedom, we have seen, demands protection of expectations deemed fair. This raises the question of why law and morals should limit expectation protection to a person's fair or reasonable expectations, an objective standard, and thereby sacrifice important autonomy values by failing fully to protect a person's actual, subjective vision of the world. If it

44. *See, e.g.*, Frazier v. State Farm Mut. Auto. Ins. Co., 347 So. 2d 1275, 1276 (La. Ct. App. 1977) (allowing mother's claim against babysitters for negligent supervision of child run over by car). *Cf.* McConnell v. Cosco, Inc., 238 F. Supp. 2d 970, 984 (S.D. Ohio 2003) (holding that risk that babysitter might leave baby unstrapped in high chair was foreseeable).

45. See Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976), where the court split in addressing this situation.

46. *See generally* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373–75 (5th ed. 1984) (explaining the nature of affirmative duties in such situations); Richard W. Wright, *The Standards of Care in Negligence Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249 (David G. Owen ed., 1995) (examining the ethics of relationships in shaping responsibility).

were possible, it would seem that the law should strive to protect the actual expectations of most people in most situations in order to maximize the autonomy and other well-being of all concerned. Yet this is a world of limited resources where people often have differing expectations about how the future will unfold, as well as differing expectations about the kind of behavior toward others that may be appropriate in myriad contexts. In situations of disparate expectations like this—cases of "expectational conflict"—one or both persons may suffer harm from a collision, literal or figurative. So, if the driver of one car enters a roadway at right angles to another car travelling down the roadway, one or both drivers may believe they have the right of way; or, regardless of who actually may have the right of way in an ambiguous situation, one or both may believe that a collision simply will not occur. If a collision does result, basing responsibility on the parties' actual, conflicting, and possibly indeterminate expectations may be impractical and unjust.

A standard of "fair" expectations, implying an equality of respect, suggests that a person's protectable expectations be "reasonable." Indeed, the reasonableness vel non of a person's expectations and behavior based thereon is the formal standard of proper behavior widely applied by the law of tort.[47] While vested rights—based on contract, property, statutory law, custom, or otherwise—ordinarily should control tort-law rights in a system of equal freedom,[48] the law needs a principle of default to apply to cases of expectational conflict (such as the intersectional collision case, above), just as the law needs a default standard to apply in cases of vague and indeterminate expectations, where one or both persons act quickly and instinctively without much thought. The need for such a default standard is strongest in accident situations between strangers where no promises, customs, rules of the road, vested rights, or other concrete standards of proper behavior exist.[49] Tort law appropriately turns here by default to a cost-benefit principle of utility or efficiency, where an actor's conduct is deemed deficient if the cost of an untaken precautionary measure was less than the cost of harm the precaution was expected to prevent.[50] People in

47. *See generally* DAN B. DOBBS, THE LAW OF TORTS § 117 (2000); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984).

48. *See* Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. 145 (2003).

49. David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1679 (2007) (so asserting).

50. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) (articulating what has become known as the "Hand formula" for ascertaining whether an actor's conduct was negligent, where negligence is implied if $B < P \times L$).

accident situations normally do not consciously engage in cost-benefit calculations of this type, yet assessing the fairness of the parties' expectations after an accident by this standard often is a sound surrogate for evaluating conduct where meaningful safety expectation assessment is difficult or impossible. In such cases, where expectation rights appear little more than vapor, utilitarian theory provides practical, moral bedrock for responsibility determinations.

Long ago, of course, tort law generally adopted objective rather than subjective standards of behavior for evaluating a defendant's conduct, including the (reasonable) foreseeability of harm.[51] Partial justification for grounding responsibility for accidental loss in an objective standard lies in the fact that tort law, unlike moral theory, necessarily operates in an imperfect world where truth is perceived obliquely and where proof of truth in courtrooms is even further removed from its Platonic ideal. An early English court explained this perspective—a real world, "rough-justice" approach—in *Vaughan v. Menlove*,[52] where the dim-witted defendant built a combustible hayrick at the boundary of his land near his neighbor's cottages, which burned down when the rick ignited. Rather than allowing the defendant to be judged according to whether he "acted honestly and bonâ fide to the best of his own judgment," the court explained that a practicable legal rule required evaluating the conduct of all persons by a uniform standard of reasonable prudence.[53] If the law chooses to place human will (freedom or autonomy) at the center of its theory of responsibility, in other words, the law simply has to accept the fact that the translation of moral to legal responsibility is somewhat rough, to say the

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51. This section draws from David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1286–90 (2009).

52. (1837) 132 Eng. Rep. 490 (C.P.); 3 Bing. N.C. 468.

53. *Id.* at 493, 3 Bing. N.C. 468. The court stated:

> Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.

Id. at 475, 132 Eng. Rep. at 493. Compare Holmes's colorful explanation:

> If . . . a man is born hasty and awkward, is always . . . hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

HOLMES, *supra* note 33, at 108.

least.[54] Rough tort justice, one might well conclude, is better than none at all.[55]

To this rough-justice practicability pole, we may attach a more satisfying, moral explanation of why people fairly may be held responsible for harmful consequences they do not expect, or otherwise fail to avoid, but that prudent people would. At some level, all people understand that their actions may produce harmful consequences outside their personal realms of expectation and caution—"extra-moral" consequences for which they may not morally be to blame. Yet blame and legal accountability here part ways so the law can place such extra-moral harm under an objective umbrella of reasonable behavior for which we all fairly may be held responsible. The fairness of such legal responsibility is grounded in our shared, implicit agreement to be judged according to a behavioral norm of a reflective, cautious person.

Most persons acting in the hurly-burly world, if they stopped to think about it, probably would accept the idea that responsibility for the consequences of their actions fairly might be judged according to the standards of extra care, prudence, and respect for the interests of others that they would want others to apply to them. This kind of Kantian reciprocity rests on an assumption that most people would understand that we all must surrender a bit of personal will-to-consequence equivalence if we fail on any particular occasion to act with utmost care, prudence, and deliberation upon the variety of harmful consequences our contemplated action might produce. On the many occasions when the exigencies of practicable decision making and action in a busy world lead us to put aside robustly prudent deliberation and behavior, we opt as in a lottery, as Jeremy Waldron has explained,[56] to take our chances on and accept the foreseeable

54. *See generally* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1123–27 (2007) (explaining that tort law, though properly viewed as a law of wrongs, need not perfectly match wrongdoing with responsibility for redress). Yet Ernest Weinrib argues powerfully that the connection between private law and moral theory is elegant and pure. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 20 (1995) ("Private law makes corrective justice and Kantian right explicit by actualizing them in doctrines, concepts, and institutions that coherently fit together.").

55. For an early inquiry into "rough justice" at work in tort, see Clarence Morris, *Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730 (1930). *See generally* Bernard Williams, *Afterword, What Has Philosophy to Learn from Tort Law?*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 487 (David G. Owen ed., 1995) (discussing lessons that philosophy can learn from the practical experience and concrete struggles of tort law).

56. *See* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 401–05 (David G. Owen ed., 1995) (explaining how liability for unexpected consequences in tort can be understood in terms of a lottery). The lottery concept invites comparison to Tony Honoré's characterization of choice as a kind of bet. *See* Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L.Q.REV. 530,

consequences of such shortcuts, unexpected though they may be. In such situations, where we act according to our own practicable moral compass, yet contrary to higher moral norms, we might well be fairly deemed to consent to take responsibility for the harmful consequences we "negligently" cause—those consequences that lie outside the scope of harm we actually contemplate but that remain inside the realm of harm we should have contemplated and avoided had we acted with the full prudence and solicitude toward others demanded by their equal worth.

A Waldronian reciprocal lottery explanation along these lines, grounded in the common will and in the correlative relationship between doers and sufferers of harm under corrective justice,[57] may help justify an objective standard of responsibility in tort that stretches beyond expected consequences to include all consequences that, after the fact, are deemed to have arisen foreseeably from hazards then deemed to have been reasonably avoidable. If only indirectly and unconsciously, members of a community thus may be seen to accept responsibility for extra-moral harm that lies outside their personal moral spheres of conscious wrongdoing, yet that remains inside the broader reasonableness and foreseeability bubbles that we understand fairly circumscribe responsibility in tort for the consequences of our actions. So, when such risks—unexpected yet foreseeable and reasonably avoidable—do eventuate in such extra-moral harm, it is fair to hold an actor accountable in tort.[58]

However imperfectly, then, tort law translates the moral predicate of responsibility grounded in the human will and human choice into a legal one through objective standards of reasonable care and foreseeability based on an idealized reasonable prudent person who understands that actions may produce a wide range of hazards for which actors fairly may be held

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539 (1988) ("[W]hen we reach a decision to do X rather than Y . . . we are choosing to put our money on X and its outcome rather than Y and its outcome."), *reprinted in* TONY HONORÉ, RESPONSIBILITY AND FAULT 14 (1999).

57. *See, e.g.*, WEINRIB, *supra* note 54, at 145 (positing that "negligence law unifies doing and suffering"); *id.* at 203 (stating that "the theoretical case for basing tort liability on the causation of harm without fault is inconsistent with the equality and correlativity of corrective justice and with the concept of agency that underlies Kantian right"); Allan Beever, *Corrective Justice and Personal Responsibility in Tort Law*, 28 OXFORD J. LEGAL STUD. 475, 491–93 (2008).

58. The inverse, of course, is also true: it is morally *un*fair to hold an actor accountable for harm from risks that, in addition to being unexpected, are *un*foreseeable or otherwise *un*avoidable. *See, e.g.*, PETER M. GERHART, TORT LAW AND SOCIAL MORALITY 138–39 (2010); Owen, *supra* note 51, at 1281–86; Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURISPRUDENCE 361, 377 (2004) ("[N]o norm can require a person to take account of something unforeseeable.").

responsible.[59] While translating an actor's actual, subjective expectations and moral accountability into the objective capacity of a reasonable prudent person to foresee and avoid particular types of consequences requires pounding out some imperfections in the alignment of moral and tort notions of responsibility, the fit is usually close enough to accomplish rough justice in an imperfect world.

VII. EXPECTATIONS AS A LEGAL STANDARD?

If expectations are so important to human flourishing and tort law alike, we naturally will wish to consider whether tort law should adopt the protection of fair expectations as a formal liability standard. To a large extent, this is how tort law defines responsibility for accidental harm and the scope of recoverable damages, both limited by principles of reasonable foreseeability[60]—as a surrogate, of course, for expectations deemed fair, as just discussed. Yet the pervasive legal standard limiting responsibility to consequences deemed "foreseeable" (in an effort to tie legal consequences to moral consequences flowing from an agent's will) has been roundly criticized as vague and indeterminate.[61] As malleable as limitation

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59. *See, e.g.*, WEINRIB, *supra* note 54, at 147–52; Ripstein, *supra* note 58, at 373–77. Stephen Perry may explain it best:

> [T]he existence of fault depends itself on epistemic considerations, in the form of belief in or actual or constructive knowledge of causal regularities. . . . [W]here our actions set in motion a foreseeable train of events that conforms to known or partially known causal regularities, . . . this increases our sense that we could have had a measure of control over the situation, or at least that some agent, perhaps an idealized one, could have had some control. If action generally produced outcomes that conformed to no specifiable regularities, so that we could never or almost never predict what the result of an action would be, then we would have no sense that agency was in any way meaningful, either for ourselves or with respect to its "effects" on others; there would be no sense of making a difference. It is the possibility of control, which depends in turn on the existence of knowable regularities, that creates meaning of both kinds.

Perry, *supra* note 8, at 505.

60. This, of course, is the principle of Benjamin Cardozo's decision for the majority in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), that continues to ground modern tort law. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010) (framing negligence in terms of foreseeable risk).

61. *See, e.g.*, Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) (decrying judicial use of words like "foreseeable, unforeseeable, . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions"); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) (arguing that foreseeability is "so open-ended [that it] can be used to explain any decision, even decisions directly opposed to each other").

principles based on (reasonable) foreseeability surely are, the law has found no better substitute for defining the outer boundaries of the law of tort.

While the expectations of an idealized actor do indeed shape the nebulous foreseeability shell that defines the outer perimeters of responsibility, tort law studiously avoids formulating its central rules of liability explicitly in terms of the parties' (fair) expectations. Foreseeable risk is indeed an important aspect of negligent behavior, demanded by the notion of fault that underlies the law of tort. Yet the idea of negligence is much richer, more nuanced, and far more complex than the expectability (or foreseeability) of harm alone. It is the multi-layered notion of "reason"—the *reasonableness* of an actor's damaging behavior—that more robustly frames negligence determinations than mere foreseeability of risk alone.[62] True, the fairness of actor and victim expectations often provide a reliable guide to the propriety of particular types of conduct in particular situations. Yet, reasonableness is a complicated notion that requires full consideration of the ethics of particular relationships; the recurring features of particular activities; and an evaluation and balance of the parties' respective goals and interests—against a backdrop of whatever promises, customs, statutory and other formal standards, *and* resulting expectations may have colored a particular harmful interaction. In light of the panoply of features of social interaction at play in differing contexts, legal instruments for ascertaining responsibility for particular instances of harm must be more finely tuned, and provide firmer guidance, than a fair expectations test alone.[63]

Custom, for example, importantly shapes responsible behavior and liability standards in tort (as in contract) because parties fairly expect that others normally will act as people in similar situations customarily behave. Yet, while customs spring in part from expectations, and vice versa, it generally is more practicable for a court to determine whether a party did or did not conform to a specific, customary, behavioral norm than it is to determine both parties' actual expectations of how the other would and

62. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010) (defining negligence as failing to exercise reasonable care in view of the balance of foreseeable risk against the burden of precaution to reduce the risk).

63. *See* Bailey H Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863, 865–66 (2001) ("[T]he principle of protecting reasonable expectations . . . acts as a dull blade rather than the honed scalpel needed to incise fine lines for judicial decision making in close cases. Because of this inexactitude, it can serve only as a vague principle shedding light on one of the causes of the controversy, not as an arbiter of the controversy."); Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 33 (1997) ("[T]he principle of protecting reasonable expectations . . . provides a signpost that points down the right road, but it does not provide a map to the end.").

should behave in the circumstances, then determine the fairness of those expectations, and finally identify and resolve whatever expectational conflicts might exist. Thus, as important as expectations are at bottom, expectation protection usually provides only a background ethic for liability standards that are constructed more directly on the customary components of behavioral propriety that recur in particular contexts of harmful conduct.

Formal liability standards explicitly defined in terms of expectation protection are too vague and indeterminate to be much help in providing *a priori* guidance to people on how appropriately to act, or in rendering legal assessments *ex post* on responsibility for harm. Consider a pre-school teacher who reads a magazine rather than supervising her toddlers as one toddles into the street and is hit by a car. The liability standard for custodians of young children is better defined in specific terms of *a duty to provide toddlers with constant supervision when they are near busy roadways* than in vague terms of *a duty not to frustrate the expectations of toddlers and their parents*. Parents surely do expect teachers to supervise toddlers constantly when in the vicinity of busy roadways. Yet legal standards are most helpful if they articulate specific components of proper behavior in particular contexts (even if only generally, as *a duty to provide care commensurate with the risk*) to provide meaningful guidance for teachers and others on appropriate behavioral standards before accidents occur, and for courts charged with assessing responsibility for accidental harm thereafter.

Over the last half century, tort law did make one bold effort to define a basic liability rule explicitly in terms of protecting the expectations of potential victims—an experiment that proved an utter failure and so provides a concrete example of the frailty of expectation frustration as a formal legal standard. This was the decision by many courts, begun in the 1960s, to frame the most important liability standard in products liability law—the definition of a design defect—in terms of whether the safety of an accident product met the expectations of ordinary consumers. The rise and fall of the "consumer expectations" test for design defectiveness helpfully illustrates why tort law ordinarily should not frame liability standards explicitly in terms of the protection of expectations.

How consumer expectations should figure in evaluating the sufficiency of a product's design has long bedeviled courts and commentators.[64] Prior to

64. On how representations of product safety shape consumer expectations, see Professor Shapo's classic study, Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974). This discussion draws from David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 941–43 (2009).

the development of strict products liability in tort, courts applying strict products liability in warranty drew from the law of contracts, grounded in the protection of a purchaser's expectations reasonably generated by a product's appearance and a manufacturer's representations, express and implied. When William Prosser, the Reporter for the *Restatement (Second) of Torts*, searched for a foundation for the new doctrine of strict products liability in tort, it was only natural that he would turn to the same consumer expectations basis of the warranty law cases that provided the sole authority for the new tort doctrine until *Greenman v. Yuba Power Products, Inc.*[65] And as courts began to apply section 402A to design defect cases, it was natural for them to adopt the warranty-based standard provided in that section's comments that define "defective condition" and "unreasonably dangerous" as *dangerous beyond a consumer's contemplations.*[66] Accordingly, most courts applying section 402A in the first decade of its life concluded that design defectiveness should be tested by a liability standard gauged by "consumer expectations."[67]

Soon, however, judicial application of the consumer expectations test began to reveal its frailties as a liability standard. While this test of design safety was conventionally thought more protective of plaintiff interests than the traditional tort standard of risk-utility, courts commonly applied the consumer expectations test to *deny* recovery rather than to allow it. Obvious dangers (such as the risk to human limbs from an unguarded power mower or industrial machine) are virtually always contemplated or expected by the user or consumer, who thereby is necessarily unprotected by the consumer expectations test—no matter how evident and serious the danger, or how simple and inexpensive the guard or other means of avoiding it.[68] In such cases, the buyer sees and chooses to purchase, and the user sees and chooses to engage, both the product and the hazard. Thus, a consumer expectations standard invariably places the risk of injury on buyers and users who choose

65. 377 P.2d 897 (Cal. 1963).

66. RESTATEMENT (SECOND) OF TORTS § 402A cmts. g & i (1965).

67. *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW § 5.6 (2d ed. 2008) (chronicling the evolution of consumer expectations test). A parallel yet far narrower development concerned the liability test applicable to food dangers, which shifted in the last few decades from whether a harmful substance was foreign or natural in particular food to whether a consumer reasonably would expect it. *See id.* § 7.5 (describing this development).

68. *See, e.g.*, Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 799 (Wis. 1975) (holding that two-year-old plaintiff, brain damaged when he fell into an above-ground swimming pool in his grandparents' back yard, could not recover in strict liability for the failure of the manufacturer or retailer-installer to provide a self-latching gate that would have prevented the accident because "the average consumer would be completely aware of the risk of harm to small children due to this condition, when the retractable ladder is left in a down position and the children are left unsupervised").

to accept evident risks, and on third-party victims who have no say in the matter at all. The failure of the consumer expectations test to deal adequately with the obvious-danger problem profoundly undermines the test as a formal standard of liability for defects in design.

Another deficiency in consumer expectations as a liability standard in product design cases is the problem of identifying whose expectations should be considered when a buyer or user controls the safety of other persons, such as children, patients, employees, and bystanders. In such cases, the foreseeable victims of dangerous designs depend solely upon the actions of other imperfect humans, and the consumer expectations test may relieve manufacturers of responsibility for failing to adopt simple design improvements to protect the types of persons they know to be ultimately placed at risk. Finally, an intractable problem of vagueness and indeterminacy lurks in attempts to ascertain an ordinary consumer's safety expectations concerning most complex product hazards. Purchasers and drivers of cars, for example, have no way to know how much (or what type of) safety to expect in a 73° frontal-left collision with another car at a closing speed of 50–60 miles per hour.[69]

Because of problems such as these, courts in recent decades increasingly have rejected the consumer expectations test for design defectiveness and opted instead for tort law's traditional risk-utility liability standard. A risk-utility approach allows consideration of consumer expectations among other factors without giving expectation protection unfettered control over liability determinations with respect to design dangers for which manufacturers otherwise fairly should be responsible.[70] While the consumer expectations standard appears more boldly protective of consumer autonomy, such an explicitly expectational liability standard deprives tort law of its ability to apply its powerful cost-benefit rule of utility to provide fair protection to consumers and others threatened and injured by defective products. Only a cost-benefit standard can provide an effective remedy for many types of unreasonable product hazards (such as dangers that may be obvious and hence expected) that may simply and inexpensively be designed away. So, as vitally important as human expectations surely are, one may confidently predict that tort law no time soon will frame another basic liability standard solely in terms of protecting expectations.

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69. *See* Soule v. General Motors Corp., 882 P.2d 298, 308 (Cal. 1994) (observing that consumers have "no idea" how safely automobiles should perform in various collisions).

70. This is the approach taken by the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmts. f & g (2010), which relieves consumer expectations of their exalted place under Section 402A of the RESTATEMENT (SECOND) OF TORTS as the sole determinant of liability and relegates them to a mere factor in the risk-utility balance.

VIII. CONCLUSION

This Essay explores how tort law is and ought to be grounded in the fair expectations of actors, victims, and broader society. Tort law, it turns out, owes its very existence to the fact that people's expectations often differ on their conceptions of present reality and how the future will unfold. Most interpersonal harm involves some form of expectational conflict, and principles of tort, richly informed by human expectations, provide a means for fixing responsibility when such conflicts result in harm. While liability standards in tort cannot ordinarily be framed usefully in explicit expectation protection terms, the law of tort is shaped substantially by, and robustly protects, expectations it deems fair.

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